HIGH COURT OF CHHATTISGARH AT BILASPUR

M.C.C. No.95 OF 2004

Applicant		M/s Shyamlal Agarwal.
	Vs	
Non-applicants		State of Chhattisgarh.

POST FOR ORDER ON 03.10.2007

Sd/-
DHIRENDRA MISHRA
Judge

01.10.07

95

HIGH COURT OF CHHATTISGARH AT BILASPUR

M.C.C. No.95 OF 2004

Applicant M/s Shyamlal Agarwal, Through Partner Shri Shyamlal Agarwal, S/o Shri S.K. Agarwal, Ameri Road, Nehru Nagar, Bilaspur (C.G.)

Vs

Non-applicants

1. State of Chhattisgarh, Through the Principal Secretary, Department of Public Works, DKS Bhawan, Mantralaya, Raipur (Chhattisgarh)
2. The Engineer in Chief, Public Works Department, Raipur (Chhattisgarh)
3. Executive Engineer, Public Works Department, Pendra Division, Pendra Road, Distt; Bilaspur (CG).

Present:

Mr. Anand Tiwari, Advocate for the applicant.

Mr. G.K. Beriwal, Dy. Advocate General for the non-applicants.

O R D E R

(Passed on 03/10/2007)

Dhirendra Mishra, J

1) By this petition under Section 11 (6) of the Arbitration & Conciliation Act, 1996 (hereinafter shall be referred as 'the Act') the applicant has prayed for appointment of the Sole Arbitrator for adjudication of the disputes between the parties.

2) The case of the applicant is that an arbitration agreement No.23/DL 2002-03 of Annexure A-1 was executed between the applicant and the non-applicants herein for the construction of Achanakmar- Keocho- Kabir Chabutara Road and in pursuance thereof the work order was issued on 5.6.2002 and the stipulated period of construction was eight months excluding rainy season. The above agreement contained Clause 29 wherein the procedure

for appointment of Arbitrator has been provided and according to which all dispute arising out of the contract agreement is to be adjudicated by the arbitration board to be constituted by the State Government. It is stated in the petition that the applicant participated and submitted his tender for the above work on the basis of notice inviting tender published on 8.2.2002 and rates were quoted by him on the basis of rates amended up to 8.2.2002 and amendment No. II dated 1.2.2002. However, he was informed by the officers of the non-applicant No.1 vide Annexure A-4 that the payment cannot be made to the applicant on the basis of new CSR, as the effect of amendment No. II came into force w.e.f. 1.4.2002. Several correspondences were made by the applicant in this regard vide Annexure A-5, A-6 & A-7 and ultimately the applicant vide application of Annexure A-8 invoked the arbitration clause. However, the non-applicants vide their letter dated 3.3.2003 (Annexure A-10) informed the applicant that since the work could not be completed within the stipulated period, therefore, the work shall be allotted to some other agency on the cost and risk of the applicant. The above letter was replied on 14.4.2003 whereby circumstances under which work could not be completed was highlighted, however, the contract was terminated by the non-applicants vide order dated 27.2.2003 (Annexure A-12) and thereafter vide order dated 6.3.2004 debarred the applicant from participating in any tender of the department for two years. Before passing of the above order the applicant vide his letter dated 6.2.2004 invoked the arbitration clause i.e. Clause 29 of the agreement and raised a claim of Rs.1,98,02,000/- before the Chief Engineer and requested for settling the same within a period of one month or in the alternative to constitute the arbitration board.

3) In reply to the above, the non-applicants raised preliminary objection that the party not satisfied with the decision of the Chief Engineer can refer such dispute for arbitration to an

arbitration board to be constituted by the State Government and when on such request the board is not constituted by the State Government, then the aggrieved party may invoke the provisions of the Act. In the instant case there is nothing on record to show that the applicant approached the State Government for constitution of arbitral board in accordance with the Clause 29 of the agreement. The oral objection was taken that arbitral tribunal has been constituted under the C.G. Madhyastham Adhikaran Adhiniyam, 1983 and the notification for the same has already been issued on 1.3.2005 and arbitration tribunal is functional w.e.f. 2.9.2005 and therefore, the instant petition for appointment of the arbitrator is not maintainable. Reliance is placed on the orders passed by this Court and annexed with this reply as Annexure R-2 & R-3.

4) Learned counsel for the applicant submits that the applicant has applied for the appointment of the arbitrator vide his letter dated 6.2.2004, which has been filed along with the application for taking documents on record, however, the Chief Engineer did not give any decision on this application and therefore, there was no occasion for the applicant to proceed in the terms of Clause 29 of the agreement and approach the State Government for appointment of the arbitration board. Placing reliance on the judgment in the matter of **Aurohill Global Commodities Ltd. Versus Maharashtra STC Ltd.**[1] it was argued that non-applicant Chief Engineer was duty bound to give his decision on his application or to refer the matter to the State Government for constitution of arbitration board as per Clause 29 of the agreement and therefore, the application of the applicant cannot be rejected simply on the ground that he did not approach the State Government for constitution of the arbitration board. Further relying upon the judgment in the matter of **Macdermott International Inc. Versus**

[1] (2007) 7 Supreme Court Cases 120

Burn Standard Co. Ltd. and others[2] it was argued that the conduct of the parties is relevant factor in the matter of construction of a contract.

5) On the other hand, learned counsel for the State has reiterated the grounds, which have been taken by the State in the reply/preliminary objection filed by them.

6) I have heard learned counsel for the respective parties and perused the record.

7) Learned counsel for the applicant has not disputed the fact that the applicant did not approach the State Government for constitution of the arbitral board and referring the dispute arisen between the parties for adjudication to the arbitration board so constituted. So far as the argument advanced by learned counsel for the applicant that the non-applicant Chief Engineer did not give decision and therefore, there was no occasion for the applicant to approach to the arbitration board is concerned, the same cannot be accepted because the Chief Engineer is an appellate authority and there is detailed procedure prescribed under Clause 29 of the agreement, which provides that all questions arising out of or relating to the contract shall be referred to the Superintending Engineer in writing for his decision within a period of 30 days of such occurrence of dispute. The Superintending Engineer is required to give his decision within a period of 60 days of such request. This period may be extended by mutual consent of the parties. Where the Superintending Engineer fails to give his decision in writing within a period of 60 days or mutually agreed time after being requested by the parties, the aggrieved party may within 30 days prefer an appeal to the Chief Engineer, who shall afford an opportunity of hearing to the parties and give his decision within 90 days. If any party is not satisfied with the decision of the Chief Engineer, he can refer such dispute for

[2] (2006) 11 Supreme Court Cases 181

arbitration by an arbitration board to be constituted by the State Government.

8) There is total non-compliance of the procedure prescribed under Clause 29 by the applicant before invoking Section 11 (6) of the Act, as no request has been made by the applicant to the State Government for constitution of the arbitration board. The judgments cited by the applicant in support of his case have no bearing in the facts of the present case. Thus, the instant petition, which has been filed without complying with the procedure prescribed under Clause 29 of the agreement, is premature and the same is accordingly dismissed.

Sd/-
DHIRENDRA MISHRA
Judge

03.10.2007

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